NO. 91-514

In the
Supreme Court of the United States

OCTOBER TERM 1991

D.W. SNYDER,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT GLASS
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Tel.: 504/581-9065

Attorney for Petitioner,
D.W. Snyder

Of counsel:

THOMAS E. ROYALS
ROYALS & HARTUNG
P. O. Box 22909
Jackson, MS 39225
Tel.: 601/948-7777

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Under Section 666 of Title 18, United States Code, does federal jurisdiction over bribery within a state agency extend to bribes concerning an agency function that has no nexus whatever with a program involving federal funds, solely because another, limited, totally discrete and self-contained program that happens also to be administered under the umbrella of the same state agency does receive federal funds?

2. If a complex question of purely state law is dispositive of the merits of a federal criminal appeal, must the federal court give the state's supreme court first opportunity for interpreting the state's own law when the state has created a certification procedure for that very purpose?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes & rules:

Books & articles:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

D.W. SNYDER,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion affirming petitioner's conviction on April 25, 1991. The Fifth Circuit's decision is reported at 930 F.2d 1090 (Appendix A). Panel rehearing and rehearing en banc were denied on June 21, 1991 (Appendix B).

JURISDICTION

Jurisdiction to review by certiorari the decision of a federal court of appeals

in a criminal case is provided in Section 1254(a) of Title 28, United States Code.

STATUTES AND RULES

The following statutes and rules, the text of which are set out verbatim in Appendix C, are implicated in this petition.

Section 371 of Title 18, U.S.C.

Section 666 of Title 18, U.S.C.

Section 666 of Title 18, U.S.C., as amended in 1986 and 1990.

Section 1951 of Title 18, U.S.C.

Mississippi Code Annotated (1972), Section 77-1-11.

Mississippi Code Annotated (1972), Section 77-1-11, as amended in 1990.

Rule 20 of the Mississippi Supreme Court Rules.

STATEMENT OF THE CASE

Petitioner D.W. Snyder was for 25 years one of three commissioners of the Mississippi Public Service Commission (PSC). The PSC regulates, licenses, and sets the rates of

various public utilities and common carriers in Mississippi.

The government brought two indictments against petitioner. Under one of the indictments, it was alleged that in 1985 and 1986 petitioner took bribes for his votes on increased electric rates sought by an electric utility, Mississippi Power & Light Co. (MP&L), and in authorizing a settlement of longstanding curtailment and overcharge lawsuits by MP&L against one of its out of state natural gas suppliers.[1] Petitioner's defense on the merits was that he had not been bribed at all. This indictment, the "bribery case," charged both conspiracy to commit bribery with named co-defendants and bribery in violation of Sections 371 and 666 of Title 18, United States Code.

The second indictment charged violations of the Hobbs Act, Section 1951 of

---

[1]The PSC did not regulate this supplier.

Title 18, United States Code. Under this indictment, the "extortion case," it was alleged that petitioner, by consent, extorted monies disguised as campaign contributions from the principals of two private telephone companies and one common carrier. Petitioner's defense on the merits in the extortion case was that the monies paid to him were voluntary campaign contributions. The extortion case also included tax evasion counts for petitioner's failure to pay taxes on the allegedly extorted monies, in violation of Section 7206(1) of Title 26, United States Code.

Once petitioner's co-defendants in the bribery case were severed, the government consolidated the bribery and extortion cases for trial. On December 15, 1989, a jury convicted petitioner on all counts. The district court sentenced petitioner in both cases to concurrent terms totalling eight years (including 18 month concurrent sen-

tences on each tax count), but to consecutive fines of $50,000 in each case. Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed.

1. In the bribery case, before trial, petitioner moved to dismiss. He argued that the jurisdictional amount required for application of Section 666, $10,000 in federal funds in one year, was not met in his case. More than $10,000 in federal funds were paid, but they were paid to a discrete subdivision of the PSC which was completely unaffected by the alleged bribery and the integrity of those federal funds was never and could never have been at risk.

a. Petitioner contended that the PSC performed many functions in its licensing, rate-setting and regulatory activities for telephone, electric, gas and water utilities, and railroad, bus and motor carriers. The rate-setting function in the electric

utility case (and the PSC's role in approving the settlement of the supplier lawsuits) was a discrete aspect of the commission's work, distinct from other functions. This aspect of the commission's work was untouched in any way by funds originating in or derived from the federal government. Nor were funds originating in or derived from the federal government touched by the alleged bribe. Thus, the alleged bribe could not have placed federal funds at risk.

b. The government in response did not dispute these factual contentions. Instead, the government presented evidence that the PSC also had created a small division called the Gas Pipeline Safety Division. The five employees in this division were safety inspectors for natural gas pipelines that passed through the State of Mississippi. These safety inspectors were charged with insuring safety standards, both federal and state, for operational natural gas pipelines

and for pipelines under construction. Because the division was charged with enforcing federal safety standards adopted by the United States Department of Transportation, the DOT reimbursed the PSC for 50% of the cost of the division's safety inspections. In 1985, the safety program reimbursements amounted to $80,067.97; in 1986, to $86,567.97. This, said the government, was sufficient to invoke jurisdiction under Section 666.

c. The expenses of and reimbursements to the Gas Pipeline Safety Division were closely audited by the DOT. None of the funds reimbursed to the division could be drawn on by the PSC in any of its other functions. Neither the commissioners' salaries, nor the costs of the rate-setting proceeding, nor the costs of supervision of the electric utility (and its lawsuit settlements), nor indeed any other cost or expense of any other function of the PSC

could even theoretically be affected by the DOT reimbursements. All federal monies paid under the umbrella of the PSC were program-specific.[2]

The district court nevertheless found Section 666 jurisdiction because of the Gas Pipeline Safety Division reimbursements, and denied petitioner's motion to dismiss. At trial, and in the light most favorable to the verdict, the government proved by circumstantial evidence that petitioner had been promised and may in fact have received money and an airplane ride for his vote in the electric rate case and lawsuit settlements involving MP&L.

---

[2]The PSC also received federal reimbursements through the DOT in 1985 and 1986 for certain of its expenses in regulating commercial motor carriers. In neither year, however, did these federal funds exceed $10,000, the program-specific jurisdictional amount under Section 666. The government did not suggest Section 666 jurisdiction because of these payments.

2. In the extortion case, the government offered the evidence of the principals of two independent telephone companies and one common carrier that, in the light most favorable to the verdict, proved extortion by consent under color of official right. Petitioner's defense was that monies paid to him by the three principals were voluntary campaign contributions for a PSC commissioner who repeatedly had to stand for re-election. Petitioner's defense, however, never received its due because the district court charged the jury that Mississippi law barred petitioner from receiving even voluntary campaign contributions.

In its charge, the district court defined "extortion under color of official right" as "the wrongful taking by a public officer of money or property **not due him** or his office, whether or not the taking was accomplished by force, threats or use of fear." The court, over objection that its

interpretation of Mississippi law was incorrect, then told the jury that because campaign contributions were barred by a Mississippi statute, MCA 77-1-11, such campaign contributions could not be and were "not due" to petitioner.

> The court instructs you that as a matter of law a Public Service Commissioner is prohibited from accepting campaign contributions from public utilities and common carriers and that, accordingly, such contributions are not money or property such a public officer is entitled to receive.

Government counsel, under the authority of the court's charge, framed the proposition for guilt on the Hobbs Act counts thusly:

- The "basis for the extortion charges [is] whether or not" petitioner was "entitled to receive that money."

- The Mississippi statute "absolutely prohibits Mr. Snyder from accepting any money, any gift, any pass, any benefit whatsoever from one of the people that he regulates."

- "It doesn't matter if he calls it a campaign contribution....

> He cannot accept it. He can't take it."
>
> - "It's over with." "The judge gave you the law on that."

On appeal, petitioner argued that the district court erroneously interpreted the Mississippi statute so as to deny him his defense. The statute, previously unconstrued by the Mississippi courts, was difficult and unclear on a number of scores. Petitioner asked the Fifth Circuit to certify the question of the statute's meaning and application to the Mississippi Supreme Court under that court's Rule 20. The Fifth Circuit declined to do so and instead, with no Mississippi law to guide it, ratified the district court's interpretation of Mississippi law.

REASONS FOR GRANTING THE WRIT

At the heart of this petition for certiorari is a question of political philosophy: How should we approach federal criminal prosecutions that potentially usurp

sovereign state interests? In both of the issues discussed here, the court of appeals traveled a philosophical path that all but disregards important state interests as worthy of consideration and deference. As a consequence, the decision of the court of appeals on both issues undermines core values of our federalism.

A. When it enacted Section 666 of Title 18, Congress intended to protect from bribery and other assaults on their integrity federal funds provided to state and local governments and agencies. Congress did not intend to create a bribery statute of such generalized application that purely local bribes with no conceivable impact on the integrity of federal monies also become federal crimes. The Court should grant certiorari to examine whether, in construing Section 666 so expansively, the court of appeals disregarded and devalued core principles of federalism.

1. The Mississippi Public Service Commission engages in many and varying

activities in its licensing, rate-setting and regulation of telephone, electric, gas and water utilities, and railroad, bus and motor carriers. In effect, the PSC is an umbrella agency for a large number of distinct activities. In other jurisdictions these activities are performed by separate agencies.

The alleged bribery in this case had to do with discrete PSC functions involving one discrete entity: the rate-setting proceeding (and the approval of certain pre-existing supplier lawsuits) involving an electric utility, MP&L. The government did not allege that there was Section 666 jurisdiction because the PSC had received any federal monies from any federal program for these activities, or because any federal monies it did receive in any other activity were at risk from or because of the alleged bribery. Instead, the government suggested, and the district court found, Section 666 jurisdic-

tion because of federal reimbursements in another, totally discrete, limited, and self-contained program that happened also to be administered under the PSC umbrella.

Wearing its hat as regulator of natural gas pipelines crossing the State of Mississippi, the PSC's five person Gas Pipeline Safety Division enforced United States Department of Transportation safety regulations for pipelines. A DOT program reimbursed this small division of the PSC 50% of costs actually expended for inspections. The PSC had no discretionary authority to spend gas pipeline safety reimbursements on any other of its licensing, rate-setting and regulatory functions involving any other utility or carrier. There was no possibility that because of a bribe paid in connection with the rate-setting proceeding involving the electric utility (or the settlements of the supplier lawsuits brought by that utility), any of the DOT reimbursements

could be wasted, diverted, or their integrity otherwise adversely affected.

2. In 1984 Congress added Section 666 to the arsenal of criminal statutes designed to protect federal monies going to state and local governments and agencies. In United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988), cert. denied, 408 U.S. 820, the Fifth Circuit construed Section 666 to apply whenever (assuming jurisdictional amounts) the integrity of federal funds was **at risk** because of a bribery or theft, whether or not the diverted government or agency funds could actually be traced to federal monies. The legislative history of Section 666, said the court, demonstrated an "intent to preserve the integrity of federal funds," but --

> while the legislative history [of Section 666] manifests a congressional intent to preserve the integrity of federal funds, Congress specifically chose to do so by enacting a criminal statute that would eliminate the need to

> trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds and control their administration.
>
> Westmoreland, 841 F.2d at 577.[3]

It is submitted that this is the outer limit of federal jurisdiction contemplated by Congress under Section 666: protecting

---

[3]In Westmoreland, a bribed county supervisor paid bogus invoices. The county received federal revenue sharing funds. The supervisor could have drawn on federal revenue sharing funds to pay the invoices, but she did not. Instead, she paid the invoices from state funds. She argued that because only state funds were used, Section 666 did not apply to her.

The Fifth Circuit rejected the argued limitation on Section 666 jurisdiction. The total of state and federal funds constituted the working capital of the county. The shortfall caused by the payment of bogus invoices from state funds could be made up by resorting to federal revenue sharing funds. That would implicate the integrity of federal funds, whether or not the bribery scheme could be traced to federal monies. Therefore, there was a federal interest that Congress could reasonably have intended to safeguard under Section 666: the proper administration of federal funds subject to influence by the bribery scheme. This was Congress' intent.

the integrity of federal funds, traceable or not, when federal funds are at risk. There must be at least a nexus between the offense and the federal monies sought to be protected. In petitioner's case, however, the Fifth Circuit crossed the line. "[T]he integrity of federal funds" was not at risk; federal funds could not even **theoretically** have been jeopardized by the alleged bribe to petitioner in the electric utility matters. Yet the Fifth Circuit thought it unnecessary to identify any federal protective interest upon which to rationalize federal jurisdiction over what was otherwise a purely state offense.

3. In this era of the 20th century, rare indeed is the state or local government or agency that has not received **in any aspect** of its operations federal munificence through some federal program to the extent of $10,000 -- however minor, separable or discrete from its other functions the par-

ticular federal grant program might be. The construction that the Fifth Circuit imposed upon Section 666 makes a federal criminal of virtually every state, municipal or agency employee who steals $5,000 worth of property or who receives a bribe of any amount in connection with a government activity valued at $5,000. A few hypothetical examples will make the point:

(a) Louisiana State University is, under Section 666, an agency of the government of the State of Louisiana. LSU receives student loan guarantees from the federal government totalling more than $10,000, which makes it a government agency that "receives benefits in excess of $10,000 in any one year period pursuant to a Federal program." Assume for the sake of this example that no other federal monies go to LSU. Under the Fifth Circuit's construction of Section 666, a staff janitor who cleans up in the fine arts department at night, and who steals $5,000 worth of video equipment, is a federal thief.

(b) The City of New Orleans participates in the "one per cent for art" capital improvements program, and as a consequence receives $10,000 in federal assistance in its capital program. An employee of the City's parks and parkways section, on city time and with city equipment, cuts the grass for several private companies and makes $5,000. He is a Section 666 federal criminal under the Fifth Circuit's construction.

(c) The City of New Orleans, under the jurisdictional circumstances described above, employs an assistant city attorney who is responsible to defend personal injury lawsuits brought against the City. The City is a self-insurer. When the attorney takes a $500 bribe to settle a $25,000 automobile injury case for $50,000, he becomes, by the Fifth Circuit's reasoning, a federal criminal under Section 666.

In essence the Fifth Circuit, by expansively rather than conservatively viewing jurisdiction under Section 666, held that Congress had created a hugely broad federal

bribery offense that usurps what have traditionally been offenses of purely state and local concern. If the umbrella government or agency touches $10,000 in federal funds while wearing one of its hats, then all persons wearing any other hat in any other function, program or division, no matter how unrelated to the federal funding, can be prosecuted federally if $5,000 or more is involved in the crime. That is a result not easily imputed to Congress in a federal system respectful of state hegemony over the state's own, internal functions when no compromise of a federal interest can be discerned.[4]

---

[4]The Fifth Circuit's liberal approach to jurisdiction under Section 666 contrasts with the more conservative approach of the Third Circuit in United States v. Cicco, 938 F.2d 441 (3rd Cir. 1991). The specific question in Cicco, admittedly quite different from the question in petitioner's case, was whether Section 666 applied to solicitation of election day services as a quid pro quo for obtaining city jobs. The Third Circuit identified Congress' underlying statutory focus to be on bribery and theft,

4. The reading imposed by the Fifth Circuit gives, for justification, the placement in Section 666 of the clause,

> pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance.

The clause is one of many dependent clauses in a 138-word sentence. The sentence is convoluted. And it is not so clear as to be beyond reasonable argument what **subject**

---

and found that Section 666 only ambiguously could be said to cover extorted party loyalty. The court thus construed the statute narrowly rather than broadly. And in doing so it cited pertinent legislative history that should have, but did not encourage a more conservative approach by the Fifth Circuit to the coverage of the statute. ("The Senate Report expressly notes that Congress wished the new statutory provision to be interpreted 'consistent with the purpose of this section to protect the integrity of the vast sums of **money distributed through Federal programs** from theft, fraud and undue influence by bribery.'..." -- at 444; "The goal was to protect federal funds by authorizing federal prosecution of thefts and embezzlement **from programs receiving** substantial federal support even if the property involved no longer belonged to the federal government..." -- at 445).

Congress intended the critical clause to modify.

The Fifth Circuit chose to describe by the quoted clause **the kind** of "organization" or "State or local government agency" covered. Congress as well could have intended to describe by the quoted clause **the activity of the agent** rather than **the kind of agency.** If the latter construction is accepted, as petitioner contends it must to be consistent with the legislative history, the scope of coverage of Section 666 is limited to a safeguarding of only federal monies touched by bribery or theft, and the overbreadth problems described above are eliminated.

The statute could sensibly be construed to read:

> (a) Whoever, **pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance,** being an agent of an organization,

> or of a State or local government agency, that receives benefits in excess of $10,000 in any one year [under such program], embezzles, steals, purloins, willfully misapplies, obtains by fraud, etc.

Such a construction of Section 666 is reasonable. It eliminates the startling results described in the examples. It respects the nature of the state-federal system. And it comports with Congressional intent, as that intent is revealed in the legislative history.[5]

5. The title given by Congress to Section 666 is "Theft or bribery **concerning programs receiving federal funds.**" The title suggests that Congress intended Section 666 to apply only when there is **a nexus** between an alleged bribery or theft and a

---

[5]Compare McNally v. United States, 484 U.S. 350 (1987); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971); and United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).

federally funded program. Congress created federal jurisdiction for bribery and theft when the bribery or theft impacts a federal program. The legislative history demonstrates that Congress acted consistently with the title it gave to Section 666.

a. The bribery prohibition of Section 666, enacted into law in 1984, was derived from a carefully considered section of the proposed federal criminal code that had been adopted by the Senate but not passed in the previous Congress. S. 1630, entitled the Criminal Code Reform Act of 1981, 97th Congress, 1st Session. S. 1630 was the subject of a detailed section-by-section analysis in the Report of the Senate Judiciary Committee. S. Rep. No. 97-307, 97th Cong., 1st Sess. (12/22/81). That report is the primary source for the intended scope of Section 666 jurisdiction.

Section 1351 of S. 1630 granted federal jurisdiction over bribery of state or local public officials --

> ... if the public servant is an agent of a State or local government charged b a Federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a Federal program, **and the official action or legal duty is related to the administration of such program.** This provision, in conjunction with a similar bar in section 1751 (Commercial Bribery), is designed to overcome the holding in the Del Toro case,[6] and extend Federal jurisdiction to corrupt payments made to persons who are administering federally sponsored or funded programs, although not themselves Federal public servants. The Committee believes that the Federal government has a sufficient interest in the integrity of the

---

[6]In United States v. Del Toro, 513 F.2d 656 (2nd cir. 1975), cert. denied, 423 U.S. 826, the Second Circuit reversed the bribery conviction of a city employee convicted under Section 201 of Title 18, United States Code. Although the defendant administered federal funds and although his program was supervised by the federal agency which dispensed the funds, he was not, said the Second Circuit, included within the statute as a "federal public official" or a "special Government employee."

> programs it supports, involving in aggregate many millions if not billions of dollars, to warrant the creation of such jurisdiction.... By the phrase "monies or property derived from" **the Committee intends to reach those programs (and official acts or legal duties relating thereto) to which the Federal Government has contributed significant funds**, irrespective of whether the particular monies or property whose administration is sought to be corruptly influenced can be traced to the Federal government. **Whether it is Federal monies that are affected, or other monies that, upon being diverted, may have to be replaced in part by the Federal funds**, the effect on Federal taxpayers is the same.
>
> S. Rep. No. 97-307, at 432-433 (emphasis added).

This source explanation for Section 666 demands a nexus between the misconduct and the federal funds -- the "official act or legal duty" which was the subject of the bribery had to be one relating to the administration of the program from which the federal funds were derived. The nexus is satisfied so long as the funds improperly diverted because of the bribery "may have to

be replaced in part by the Federal funds," and thus it would be unnecessary to trace to a federal source the monies expended because of the bribe. This is what the Fifth Circuit understood in its Westmoreland decision, but lost sight of in petitioner's case, where neither of the necessary connecting conditions was present.

b. Senate Report No. 98-225 of the 98th Congress explained the provisions of the Comprehensive Crime Control Act of 1984 that became Section 666. S. Rep. No. 98-225, 98th Cong., 1st Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3510.[7] It acknowledged that the act's bribery provision came from S. 1630, as discussed above. Id. It also contained the following footnote (id.):

---

[7]The Fifth Circuit's Westmoreland case relied upon this Senate Report in reaching its conclusions on Congressional intent. 841 F.2d at 575-577.

> See, e.g., sections 1731 (Theft) and 1751 (Commercial Bribery) of S. 1630 and the discussion at **pages 726 and 803** of S. Rep. No. 97-307 (97th Cong., 1st Sess.).

An examination of these references produces additional support for petitioner's reading of Section 666.

For both the theft and commercial bribery sections of S. 1630, Senate Report No. 97-307 had emphasized a federal jurisdictional requirement that the property in question be connected to the specific program in which the federal benefits were received. For jurisdiction over theft

(Section 1731 of S. 1630[8]), S. Rep. No. 97-307 stated, at 726:

> The jurisdictional base, while broad in its concept, contains various **limiting features, so as to insure against an unwarranted expansion of Federal jurisdiction into areas of little Federal interest.** The limiting features are (1) the requirement that the theft involve at least $5,000, (2) the requirement that the theft be **from a program** that received at least $10,000 in Federal benefits over a one-year period, (3) the requirement that the property stolen be property owned by or under the care, custody, or control of, **the program** and (4) the requirement that the offense be committed by an agent of the receiving organization or government agency.

---

[8]Section 1731 of S. 1630 is the source of the theft provisions in Section 666. Section 1731 provided "Federal jurisdiction if the property has a value of $5,000 or more and is property owned by, or under the care, custody, or control of, an organization, or a State or local government agency, that received benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a form of Federal assistance, and if the offense involves property owned by, or under the care, custody, or control of, the program and is committed by an agent of such organization or agency." S. Rep. No. 97-307 at 726.

For jurisdiction over commercial bribery (Section 1751 of S. 1630[9]), S. Rep. No. 97-307 explained, at 803, that the bribe recipient's improper conduct also had to relate to the federally funded program:

> The ninth jurisdictional base creates Federal cognizance over an offense of commercial bribery if the agent or fiduciary is of an organization charged by a Federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a Federal program, **and** if the recipient's conduct is related to the administration of such program.... **The concept is to protect the integrity of the vast sums of money distributed pursuant to Federal programs from undue influence through bribery,** by creating Federal jurisdiction **when the conduct sought to be affected is related to the administration of the program.** No similar basis for Federal prosecution exists today, and unfortunately, although understandably, States and localities are often

---

[9]Section 1751 of S. 1630 applied to bribery of an agent of **an organization** administering federal funds, whereas Section 1351 applied to bribery of an agent of **a state or local government** administering federal funds. Both of these categories of agents are covered by Section 666.

> reluctant to pursue such cases out of a belief that the aggrieved party is primarily the Federal government.

c. Finally, the Senate Report for Section 666 itself, although much shorter in its explanation, is fully consistent with the explanation for the source provisions in S. 1630. Not only does S. Rep. 98-225 expressly cite with approval S. 1630 and S. Rep. 97-307, as noted above, but it too states that "[t]he purpose of this section [is] to protect **the integrity of** the vast sums of monies distributed to Federal programs from theft, fraud, and undue influence by bribery." Id. at 370; 1984 U.S. Code Cong. & Admin. News at 3511.[10]

---

[10]Senator Thurmond, Chairman of the Judiciary Committee, informed the Senate that the section adding Section 666 to Title 18 dealt with bribery concerning a federally assisted program. It "covers fraud or **bribery concerning a program** of a private organization or of a state or local government that receives federal financial assistance. It is based on a similar provision in S. 1630." Congressional Record, Vol. 129 (8/4/83), at p. S. 11703 (daily ed.), de-

d. In sum, the legislative history of Section 666 conclusively ratifies its title: "Theft or bribery **concerning programs** receiving federal funds." The statute can fairly and sensibly be read to comport with unambiguous Congressional intent. And it should be read to comport with Congressional intent. If Section 666 is extended as the Fifth Circuit has done in petitioner's case, the statute will drastically rework federal-state responsibilities for the prosecution of criminal offenses when Congress has expressed no interest in such an expansion. The Fifth Circuit's expansive reading of Section 666 needlessly -- and heedless of Congress' intentions -- undermines the divi-

---

scribing Section 1104 of S. 1762, 98th Cong., 1st Sess., the "Comprehensive Crime Control Act of 1983." The same analysis of the section on bribery is also set forth in the Congressional Record of March 16, 1983, at p. S. 3157. (At that point the provision was Section 1504 of S. 829.)

sion of responsibilities envisioned by our federal system.

6. The drastic expansion in the scope of Section 666 beyond Congress' stated intentions raises the specter of a McNally correction years after the courts of appeals have wandered down a forbidden path. McNally v. United States, 483 U.S. 350 (1987).

For years and years the federal appellate courts had given a liberal and continually expanding meaning to the mail fraud statute, Section 1341 of Title 18, United States Code -- that it criminalized not only fraud involving money and tangible property but also the intangible right to good government. McNally held that, when it enacted Section 1341, Congress never intended that result. However, before McNally was decided, untold numbers of defendants were convicted, at trial or by guilty plea, of a federal crime that did not exist. Many

convictions had to be undone in the wake of McNally. Innumerable hours of lawyer, judge and citizen time were wasted in prosecutions that should never have occurred.

Section 666 is a handy tool for federal prosecutors, like the mail fraud statute. In light of the decision in petitioner's case, prosecutions under Section 666 will rapidly proliferate, as occurred when the mail fraud statute came to be construed liberally and expansively. Already, other circuits have begun to follow the Fifth Circuit's lead in federalizing for Section 666 purposes entire agencies and government bodies of state and local government, solely because a discrete program under the umbrella of the agency or government body received in excess of $10,000 in federal monies.[11]

---

[11]See United States v. Simas, 937 F.2d 459, 463 (9th Cir. 1991)("By enacting section 666, Congress plainly decided to protect federal funds by preserving the integrity of **the entities that received the federal funds...**").

Official after official who commits a local, non-federally implicated offense will be prosecuted regularly under the Fifth Circuit's view of Section 666's limitless jurisdiction.

The cases are just beginning to percolate up to the appellate courts, but the lesson of McNally is that now is the time to construe Section 666 definitively in light of its legislative history. There is no utility in waiting for more circuits to follow, or diverge further from, the path marked by the Fifth Circuit in petitioner's case. For reasons of systemic efficiency, this is the important time. The Court should grant certiorari to examine the scope of jurisdiction under Section 666.

B. It is time for this Court to set standards consistent with principles of federalism as to when, in a federal criminal case, a United States court of appeals should certify a determinative question of state law to the state's highest court.

1. In petitioner's Hobbs Act prosecution, a question of Mississippi state law determined the outcome of his federal appeal. The government contended at trial that petitioner, as a Public Service Commissioner who regulated telephone and trucking companies, extorted monies from the principals of two independent telephone companies and one trucking firm "under color of official right." Petitioner's defense was that the monies he received were voluntary campaign contributions. Compare, McCormick v. United States, ___ U.S. ___, 111 S.Ct. 1807 (1991). The jury was not permitted to resolve this factual dispute, however, because the trial court, over objection,

instructed the jury that under a Mississippi statute, MCA 77-1-11, petitioner was --

> prohibited from accepting campaign contributions from public utilities and common carriers and that, accordingly, such contributions are not money or property such a public officer is entitled to receive.

2. Mississippi has created a procedure for certification from federal appellate courts to its Supreme Court of --

> questions or propositions of law of this state which are determinative of all or part of [a federal] cause and there are no clear controlling precedents in the decisions of this Court....
>
> Mississippi Supreme Court Rule 20.

Of the other 49 states, fully 39 and the District of Columbia have created similar procedures for certification.[12] In 1977

---

[12]Twenty-nine states, including Mississippi, have legislatively or by state supreme court rule adopted variations of the **Uniform Certification of Questions of Law Act**, which permits discretionary acceptance of questions of state law certified from the United States Supreme Court and the federal circuit courts of appeal (and, in its broad-

---

est formulation, from federal district courts, as well as from the highest courts of appeal and intermediate courts of appeal of other states). (**Alabama**) Ala. Rules of App. Proc., Rule 18; (**Arizona**) A.R.S. §§12-1861 to 12-1867 and Rules of Supreme Ct., Rule 27; (**Colorado**) C.R.S., Vol. 7B, Colo. App. Rules, Rule 21.1; (**Connecticut**) C.G.S.A. §51-199a; (**Florida**) Fla. Rules of App. Proc., Rule 9.150; (**Georgia**) C.G.A. 1981 §24-4537 (Supreme Ct. Rule 37); (**Indiana**) A.I.C. 33-2-4-1, App. Rule 15(O); (**Iowa**) I.C.A. §§684A.1 to 684A.11; (**Kansas**) K.S.A. §§60-3201 to 60-3212; (**Kentucky**) Ky. Rules of Civil Procedure, Rule 76.37; (**Louisiana**) LSA-R.S. 13:72.1 and Supreme Court Rule 12; (**Maine**) Rules of Civil Proc., Rule 76B; (**Maryland**) Code, Courts and Judicial Proceedings, §§12-601 to 12-609; (**Massachusetts**) Rules of Supreme Judicial Court, General Rule 1:03; (**Minnesota**) M.S.A. §480.061; (**Mississippi**) Rules of Supreme Ct., Rule 20; (**New Hampshire**) RSA 490, Supreme Ct. Rules, Rule 34; (**New Mexico**) Rules of App. Proc., Rule 12-607; (**North Dakota**) Rules of App. Proc., Rule 47; (**Ohio**) Supreme Court Rules of Practice, Rule XVI; (**Oklahoma**) 20 Okla.St.Ann. §§1601 to 1611; (**Oregon**) ORS 28.200 to 28.255; (**Rhode Island**) Supreme Court Rules, Rule 6; (**South Dakota**) SDCL 15-24A-1 to 15-24A-11; (**Washington**) RCWA 2.60.010 to 2.60.900; (**Wisconsin**) W.S.A. 821.01 to 821.12; (**Wyoming**) Rules of Appellate Procedure, Rules 11.01 to 11.07.

An additional 11 states have independently enacted statutes or supreme court rules authorizing discretionary review by the state supreme court of questions certified by federal courts. (**Alaska**) Rules of App.

former Chief Judge John R. Brown of the Fifth Circuit wrote his seminal article on certification. J. Brown, "Certification--Federalism in Action," 7 Cumberland L.Rev. 457 (1977). Yet, one searches long and hard in the decisions of Judge Brown's own Fifth Circuit and indeed in all the circuits for federal criminal cases in which state law issues, determinative of a federal appeal, have been certified to the state courts

---

Proc., Rule 407; (**Delaware**) DRCA, Vol. 16, Supreme Court Rules, Rule 41 (Supp. 1990); (**Hawaii**) Rules of App. Proc., Rule 13 (Supp. 1991); (**Idaho**) Code, App. Rules, Rule 12.1; (**Illinois**) I.S.A. 110A ¶ 20 (Practice Rules, Supreme Court Rules); (**Nevada**) Rules of App. Proc., Rule 5; (**New York**) Court of Appeals, Rules of Practice, §500.17; (**South Carolina**) App. Ct. Rules, Rule 228; (**Tennessee**) Rules of the Supreme Court, Rule 23; (**Utah**) Rules of App. Proc., Rule 41; and (**Virginia**) Code 1950, Vol. 11, Rules of Supreme Ct. of Va., Rule 5:42. The **District of Columbia** has enacted its certification rule in D.C. Code 1981, §11-723, and **Puerto Rico**, in Supreme Court Rule 27 (4 L.P.R.A. App. I-A).

responsible for developing and articulating state law.[13]

The Fifth Circuit followed the pattern in petitioner's case. Petitioner requested that the court certify to the Mississippi Supreme Court the question of whether MCA 77-1-11 barred voluntary campaign contributions to him by the principals of the companies involved. The Fifth Circuit refused.

---

[13]United States v. Cissell, 700 F.2d 338 (6th Cir. 1983), appears to be the only referral since 1977 by a federal court of appeals in a federal criminal case. There, a jury found defendant guilty of a RICO violation predicated on three counts of alleged bribery under Kentucky law. The question under Kentucky law was whether an amended bribery statute, never before construed by the Kentucky Supreme Court, required as an essential element that a public official be contacted with an offer to bribe -- a fact lacking in the case.

The Sixth Circuit certified the question to the Kentucky Supreme Court under that court's certification procedure. The Kentucky Supreme Court accepted the certified question and answered it affirmatively. As a consequence, the Sixth Circuit reversed the conviction, finding necessarily that there were no predicate violations of state law to make out the RICO offense.

Thus, a federal intermediate court interpreted a difficult and confusing but controlling state statute, never before applied or construed by the Mississippi courts, as though it were the Mississippi Supreme Court entitled to give definitive readings of state statutes.

3. The Fifth Circuit acknowledged in its opinion that it had no guidance from the Mississippi Supreme Court from which to construe the Mississippi statute at issue.

> Unfortunately, we have no Mississippi case law and little legislative history to guide us in interpreting this statute.
>
> 930 F.2d at 1093.

The Fifth Circuit further acknowledged, id., that petitioner presented a "profusion" of arguments to demonstrate that the district court erroneously construed the Mississippi statute, arguments based on --

> (1) the history of the statute, (2) comparison of the statute to other Mississippi statutes, (3) custom and practice under the

> statute, (4) the ejusdem generis doctrine of statutory construction, (5) the need to construe the statute strictly against the state, and (6) first amendment concerns implicated by construing the statute too broadly.

The court of appeals, however, eschewed "assiduous analysis," quoted O. W. Holmes, The Common Law 1 (1881) for the proposition that "[t]he life of the law has not been logic: it has been experience," and plucked one Mississippi decision out of the body of Mississippi jurisprudence to urge a "plain meaning" which does not exist.

This, it is submitted, is nothing less than fundamental disrespect for the basic division of responsibilities between federal and state courts. With a state procedure available to it for definitively construing a complex question of state law, a federal court should not be permitted to act so cavalierly.

4. The meaning of MCA 77-1-11, reproduced in Appendix C, and whether or not

petitioner was, in light of the district court's interpretation of it, properly deprived of his Hobbs Act defense, is complex and far from clear. If the question had been certified to it under its Rule 20, as requested by petitioner, the Mississippi Supreme Court would have had to confront and overcome the following points before finding that the Mississippi statute barred voluntary campaign contributions from the regulated companies in question.

a. The two sections of MCA 77-1-11 are semantically discrepant in numerous respects. For example, section (2) in terms applies only to common carriers. It uses the language, "directly or indirectly accept any gift, gratuity, emolument, or employment." It governs commissioners, but not employees. Section (1) applies only to public utilities. It uses the language, "any gift, pass, money or any other benefits

whatsoever, directly or indirectly." It governs both commissioners and employees.

(1) There is no logical explanation for these asymmetries, but there is an historical explanation. Section (2) preceded section (1) by well over half a century. Section (2) was originally entitled, "Commissioners not to accept **favors**." It was enacted when the PSC had only the functions of and was called the Railroad Commission. No one operating under this railroad statute would reasonably have been concerned that a gift or gratuity that wound up in the campaign coffers of a railroad commissioner was a **personal favor** barred by law.

(2) In 1938 the Mississippi legislature created the PSC. The PSC took over the functions of the Railroad Commission, and was given additional regulatory authority over public utilities. The prohibition against commissioners receiving personal **favors** from common carriers was carried over

verbatim from the Railroad Commission law, but it was not otherwise revised (except to substitute "member of the public service commission" for "railroad commissioner") and did not extend to favors from public utilities.

(3) In 1956 the Mississippi legislature revised the PSC law. It added section (1) of MCA 77-1-11. For the first time, PSC commissioners, who had been prohibited since 1938 (when the PSC was created) from receiving **favors** from regulated carriers, were also prohibited from receiving similar things from public utilities.

(4) The Mississippi legislature was doing no more than fill the gap that had existed for 20 years. It was not mining new ground. The legislature intended to place favors from public utilities on an even footing with favors from common carriers. Certainly it was not revamping wholesale longstanding fundraising practices of elect-

ed PSC commissioners.[14] For if it had intended to reform fundraising practices, how could one explain the fact that common carriers, which had never been prohibited from making campaign contributions to commissioners, could, **after** the 1956 amend-

---

[14]Custom and practice under a statute that exhibits such a state of internal disarray is certainly relevant to appreciating its meaning. The Mississippi Supreme Court, unlike the federal court of appeals, would likely have taken local custom and usage quite seriously in construing the statute.

Petitioner testified affirmatively that for the over 25 years that he had been a commissioner, it was "customary for Public Service Commissioners to take such campaign contributions" from regulated utilities and carriers. The government called no one and offered no evidence to dispute petitioner that this indeed had been the custom and practice for over a quarter of a century. In the 33 years prior to petitioner's trial during which section (1) of MCA 77-1-11 was on the books and the almost 100 years that section (2) was on the books, there had never once been a judicial construction by a Mississippi court of either provision, let alone one (at least until petitioner's case, and then by a **federal** court) that suggested a rule contrary to petitioner's understanding. No commissioner had ever been prosecuted under the statute.

ments, continue to contribute to the campaigns of commissioners?

b. The Mississippi legislature well knew what language to employ when it intended to ban contributions by regulated entities to campaigns of the elected officials who regulate them. Among other things, another Mississippi statute in terms banned campaign contributions -- to highway commissioners -- but the legislature drew a different line for PSC commissioners. The legislature did not use the language of the Highway Commissioner statute in MCA 77-1-11.

(1) Mississippi enacted legislation creating an elected Highway Commission in 1930. The act provided:

> It shall be unlawful for any person who is a candidate for the office of Highway Commissioner created under the provisions of this act, to receive, accept or become the beneficiary of, directly or indirectly, **any contribution** or gift of money or other thing of monetary value, whether offered, received or accepted **for campaign expenses** or

> otherwise, from any person in the business of contracting to build roads, etc.***

The highlighted language explicitly prohibited a highway commissioner from accepting "any contribution... for campaign expenses." That language continued unamended, as MCA 97-15-7, into the 1972 Code (until its repeal in 1990), the same code that contained MCA 77-1-11.

(2) On the other hand, the elected Railroad Commission (the predecessor to and in 1938 subsumed by the newly created PSC) was governed since the Mississippi Code of 1892 by the following prohibition:

> **4274. Commissioners not to accept favors; penalty.** -- Any railroad commissioner who shall directly or indirectly accept any gift, gratuity, emolument, or employment from any person or corporation owning or operating any railroad, or from any other common carrier, during his continuance in office... shall be subject to a criminal prosecution....***

This provision, which became section (2) of MCA 77-1-11, continuously prohibited the acceptance of the described personal **favors.**

(3) Certainly, elected highway commissioners and elected railroad and PSC commissioners have similar power and authority over their regulated entities. The potential for abuse is comparable. But the legislature drew different lines for the two agencies. Railroad commissioners were barred only from receiving personal **favors.** In 1930, when the legislature enacted the statute for highway commissioners, it chose **to add a prohibition** that did not exist for railroad (and later PSC) commissioners: "any **contribution** or gift of money or other thing of monetary value, whether offered, received or accepted **for campaign expenses** or otherwise."

(4) Chapter 371, General Laws of Mississippi (1956), added section (1) of MCA 77-1-11, the section of the statute perti-

nent to petitioner's appeal. Prior to this time, PSC commissioners were barred only from receiving personal **favors from regulated common carriers**, see above, but no similar prohibition extended to the public utilities also regulated by the PSC. The 1956 amendment added section (1) to MCA 77-1-11 to bring in public utilities. The legislature specifically chose not to use the language, on the books for over 25 years, that had barred elected highway commissioners from receiving "any contribution... for campaign expenses." Instead, the legislature chose the language "any gift, pass, money or any other benefits whatsoever."

(5) Moreover, at the very time of the 1956 amendment, another provision of the self-same PSC law affirmatively used the critical language omitted from section (1) of MCA 77-1-11. Under MCA 77-1-25, the staff of the PSC could not "**contribute** any

money or other thing of value, directly or indirectly, to any **political campaign or any candidate** for public office." Words like those highlighted were **not** used for PSC commissioners.

(6) In sum, the legislature knew the words to use when it intended to bar campaign contributions to elected officials. It used those words for elected highway commissioners. It used those words for the PSC staff. It did not use those words for PSC commissioners. That would have been strong evidence for the Mississippi Supreme Court that the Mississippi legislature did not bar campaign contributions under section (1) of MCA 77-1-11 until it revised the statute and said that they were prohibited -- in the year after the trial court

instructed petitioner's jury and three years after petitioner's last alleged offense.[15]

c. The Mississippi Supreme Court would have examined MCA 77-1-11 under accepted state principles of statutory construction. The state court would have confronted the following points arguing against a construction of MCA 77-1-11 that would have barred campaign contributions by regulated entities to PSC commissioners.

(1) First, a brief exegesis on the word "pass" supports the view that section (1) of MCA 77-1-11 was focused on the kinds of personal favors historically barred to commissioners from common carriers. The Mississippi Code of 1892 (Section 4319) had required the railroads to transport commissioners free of charge while traveling on

---

[15]It is only MCA 77-1-11 after the 1990 amendment that accords with the district court's instruction and the Fifth Circuit's construction. The amended version of MCA 77-1-11 is reproduced in Appendix C.

public business. Abuse for otherwise accepting free transportation or "evad[ing] the payment of full fare" was made a crime.

In the 1938 law creating the PSC, the railroad's obligation to provide free transport to commissioners was continued, and certain public utilities (telegraph and telephone companies) were also required to provide free service. The criminal deterrent for abuse, however, was repealed. Sections 8 & 9, Chap. 139, General Laws of Mississippi (1938). One can well expect that over the next 20 years there were abuses in the use of "free passes," and it is not much of a stretch to envision that money or some other equivalent benefit came to be paid to commissioners for free rides or free service that had been passed up. The requirements for free transport and free telegraph and telephone service were continued in the 1956 legislation, see MCA 77-1-7 (1972) (common carriers) and MCA 77-1-9

(1972) (telephone and telegraph companies), but the criminal sanction was restored that same year in section (1) of MCA 77-1-11 ("gift, **pass**, money, etc."). This is the limited compass of the word "pass" in the critical clause.

(2) Second, the word "money" in section (1), although generically broad, is also of limited compass when understood in conjunction with section (2) of MCA 77-1-11. Section (2), banned "gifts, gratuities, emoluments, or employment." Section (1) took the word "gift" from section (2) but it did not use the words "gratuity" or "emolument." Instead it substituted the word "money," which would comprehend those two terms. There is no evidence, however, that by using the word "money" in section (1), the legislature intended to expand the meaning of the prohibition beyond the kind of thing proscribed by the use of the words "gratuity" and "emolument."

Thus, all of these words in section (1) -- "gift," "pass" and "money" -- are of a kind with the words utilized in section (2). And like the words in section (2), they are intended, as the historical title of section (2) put it, to prohibit the commissioners from accepting personal favors, rather than contributions to their political campaigns.

(3) As a matter of state jurisprudence, the Mississippi Supreme Court would apply two principles of statutory construction in interpreting MCA 77-1-11. The first is the principle of ejusdem generis. The second is that penal laws are strictly construed against the state.

Under Mississippi's rule of ejusdem generis, the general words in MCA 77-1-11 -- "or any other benefits whatsoever" -- must take on the character of the special words that precede them.

> This time honored rule has been fully recognized and adopted in this state in the following lan-

> guage. "It is a well-settled rule of construction that where special words are used, and they are followed by words of more general import, the general words are to be limited to matters ejusdem generis with the special words, unless an intention may be found to extend their meaning. This rule, of course, excludes the suggestion that the mere use of general words is sufficient to indicate a purpose to include matters not ejusdem generis.
>
> State v. Russell, 187 So. 540, 543 (Miss. 1939).

Thus, the Mississippi Supreme Court would take the general phrase, "any other benefits whatsoever," to be limited by the words that precede the phrase, and construe it to mean: "any other personal **favors** whatsoever."[16]

---

[16]It is true that under Mississippi jurisprudence, the principle of ejusdem generis is not intended to render meaningless general words that follow specific words. See, Morgan v. State, 44 So.2d 45, 49-50 (Miss. 1950). But that would not likely have been the result here. Other personal "favors" of like ilk with the specifically barred "gift, pass [and] money" would be free use of vacation homes, payment of membership fees in country clubs, etc. The specifically named categories, "gift, pass, money" -- the "classes enumerated" -- do not "exhaust the category to which they

The second principle that the Mississippi Supreme Court would apply is --

> the longstanding rule that penal statutes are to be interpreted strictly against the state and construed liberally in favor of the accused. Where a statute is patently ambiguous, it must be interpreted in favor of the accused.
>
> McLamb v. State, 456 So.2d 743, 745 (Miss. 1984).

"For an act to constitute a crime, it must come within both the letter and spirit of the act." Ratcliff v. State, 107 So.2d 728, 730 (Miss. 1958). Strict construction of a penal statute that does not mention campaign contributions, and that takes it cue from a parallel provision, section (2), that condemns personal favors to commissioners and **not** contributions to their election campaigns, would have moved the Mississippi Supreme Court to hold that MCA 77-1-11 did

---

belong" -- and thus there is residual meaning to the "any other benefits" language. Id.

not prohibit contributions by regulated utilities to the political campaign funds of PSC commissioners.

d. Moreover, the Mississippi Supreme Court would not lightly dismiss the fact that political campaigns, and campaign contributions to fund them, operate at the core of the state's political process. Political campaigns directly implicate the fundamental rights of Mississippi citizens to associate, affiliate with, and support a candidate.

Under the Fifth Circuit's interpretation of MCA 77-1-11, however, the breadth of the statute's sweep over the Mississippi citizenry at large is short of breathtaking. The absolute bar, with which the Fifth Circuit eviscerated petitioner's defense, applies, if it applies to petitioner, in PSC election campaigns against "**any person**, firm or corporation employed by any public utility regulated by the commission or connected

in any way with such utility regulated by the commission" for "any other benefits whatsoever, either directly or indirectly."

It is not just the telephone companies and electric companies and gas companies and water companies themselves that are prohibited from engaging in ordinary political activities. Thousands upon thousands of Mississippi citizens -- telephone operators and meter readers, as well as executives with policy-making functions -- work for the telephone, electric, gas and water companies of Mississippi. Thousands more work for companies that regularly supply these regulated utilities. All of these citizens would be barred, under the Fifth Circuit's construction of MCA 77-1-11, from making political contributions. All would be barred from performing any campaign support work ("any other benefits whatsoever") for candidates for the PSC. No employee of a public utility could hold a party at his own

home for a commission candidate or even canvass door to door for his chosen candidate. It is difficult to believe that the Mississippi Supreme Court would have tolerated such a reading of MCA 77-1-11.

5. In sum, this was a case that cried out for certification of a controlling state law question from a federal court of appeals to a state supreme court. The dispositive state statute was in internal disarray. It had never before been construed or applied by the state courts. It employed language different from other state statutes, and only these other statutes used words that in terms barred the political campaign contributions in question. In the federal court's reading of it, the statute had major impact on the central electoral process of a sovereign state, and it drastically curtailed the participation in that process by large numbers of its citizens. The philosophical underpinnings of our federal system require

that a state supreme court, and not a federal appellate court, be made responsible for construing such a state statute.

This, then, is an appropriate case for the Court to set down standards governing when a federal appellate court must certify a dispositive question of state law to a state's highest court where the state has created procedures for certification. For too long the courts of appeals have presumed to operate in the domains of the states when there is no justification but federal imperiousness to do so. The Court should grant certiorari to consider when certification is required.

CONCLUSION

In any scheme of government in which the several states are to be given proper deference in their integral spheres as against the federal behemoth, certain systemic understandings must be respected.

First, it must not be assumed that the central government has invaded traditional state provinces unless, at the least, the central legislative body, Congress, has made clear that it is invading these provinces and taking its power to the maximum permitted by its constitutional boundaries. This Congress did not do when it enacted Section 666 of Title 18, and the lower court's carrying of the flag of federal power to impose criminal sanctions across the lines intended by Congress must be brought up short.

Second, when it is recognized that a complex state law question controls a federal decision, the state courts must be given the first opportunity to resolve the question of state law. It is disrespectful of state decision-making on questions of purely state law, indeed it is presumptuous, for a federal intermediate court to say how a state supreme court would have ruled on a

difficult and complex state statute that is dispositive of a federal decision.

In both instances, this petition presents important questions of how our unique system of sovereign states operating within a federal system should work. Certiorari should be granted to define limits essential to the proper operation of that system.

Respectfully submitted,

ROBERT GLASS
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Tel.: 504/581-9065

Attorney for Petitioner,
D.W. Snyder

Of counsel:

THOMAS E. ROYALS
ROYALS & HARTUNG
P. O. Box 22909
Jackson, MS 39225
Tel.: 601/948-7777

September 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-1191

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

D.W. SNYDER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

(April 25, 1991)

Before RUBIN, POLITZ and DUHE, Circuit Judges.

DUHE, Circuit Judge.

D.W. Snyder appeals his convictions for extortion, filing false tax returns, bribery, and conspiracy. Snyder argues that federal jurisdiction was not proper and that the district judge committed reversible error in his instructions to the jury and in his admission of hearsay evidence. Finding

that federal jurisdiction is proper and that the district court did not err, we affirm.

D.W. Snyder was the subject of two separate federal indictments involving charges that Snyder abused his position as a member of the Mississippi Public Service Commission.[1] At the time of his indictment, Snyder had served seven terms on the Commission.

The first indictment accused Snyder of three counts of extortion under color of right under the Hobbs Act, 18 U.S.C. §1951(a), and four counts of filing false tax returns under 26 U.S.C. §7206(1). The second indictment accused him of one count of conspiracy to commit bribery under 18 U.S.C. §371 and two counts of bribery under 18 U.S.C. §666. Snyder was one of three

---

[1]The Public Service Commission regulates the activities of public utilities and common carriers within the State of Mississippi. See Miss. Code Ann. §77-1-1 et seq. (1972).

defendants named in the second indictment. The other two defendants were Thurston Little and Travis Ward. After the court granted each defendant a separate trial, it consolidated Snyder's two indictments for trial.

The evidence showed that Snyder had always run his campaigns informally, often spending his own funds for campaign expenses and replacing them later when he received contributions. During one campaign, Snyder received money from two independent telephone companies and a trucking firm regulated by the Commission. Snyder contended that this money consisted of voluntary campaign contributions. The government argued that the money was the result of extortion by the commissioner under color of right.

The evidence at trial also showed that Snyder and two coconspirators participated in a complicated bribery scheme. As part of the scheme, Snyder agreed to arrange for the

Commission's approval of a company's rate increase if the company would agree to business transactions favorable to Snyder and his coconspirators. The trial testimony also suggested that Snyder accepted some funds directly in exchange for influencing the Commission's official actions. Finally, the evidence showed that Snyder failed to report as income the money he received through extortion and bribery.

Snyder was convicted on all ten counts. The court imposed concurrent prison sentences on all counts, resulting in a total prison term of eight years. It also imposed on Snyder fines of $100,000, special assessments of $500, and costs of $33,142.38.

Snyder now contends that the district judge erred in instructing the jury that Mississippi law prohibited Snyder from receiving campaign contributions from entities regulated by the Commission. He also claims that the court erroneously admitted

a hearsay statement by a coconspirator on the bribery counts.

Snyder admits that 18 U.S.C. §666 extends federal jurisdiction to cases involving bribery by officials of state agencies that receive federal funds. He argues, however, that the statute is inapplicable in this case because the alleged offenses had no impact on the federal funds received by the Commission.

Jurisdiction

Snyder was convicted of two counts of bribery under 18 U.S.C. §666, which prohibits theft and bribery by officials of state and local agencies that receive federal funds.[2] Snyder argues that section 666

---

[2]Subsection (b) of the statute in effect at the time of Snyder's alleged misconduct provides:

> Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of

should be construed narrowly to provide subject matter jurisdiction only in cases in which the official's alleged conduct directly affects the federal funds received by the agency.

This question of statutory interpretation is freely reviewable by this Court on

---

> value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

18 U.S.C. §666(a)Subsection (a) of the statute makes the law applicable to any entity "that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance." Id. §666(a).

appeal. See United States v. Westmoreland, 841 F.2d 572, 576 (5th Cir.), cert. denied, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988). Snyder urges a variety of arguments on this issue. We find it unnecessary, however, to discuss these arguments in detail because we have previously considered and rejected them. See id. at 574-78.

Snyder's attempts to distinguish Westmoreland are unpersuasive. As we noted in that case, "Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do." Id. at 577. Snyder is inextricably caught in the net.

Jury Instructions

Snyder also contends that the court erred in instructing the jury on the charges of extortion under the Hobbs Act. We review jury instructions to determine "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly

instructs jurors as to the principles of law applicable to the factual issues confronting them." United States v. August, 835 F.2d 76, 77 (5th Cir. 1987); see United States v. Graves, 669 F.2d 964, 970-71 (5th Cir. 1982).

Snyder does not argue that the district court's charge was an incorrect statement of federal law. The judge correctly instructed the jury that to establish an offense under the Hobbs Act, the government must prove beyond a reasonable doubt three essential elements: (1) that Snyder induced a person to part with property; (2) that Snyder acted knowingly and willfully by means of extortion; and (3) that the extortionate transaction delayed, interrupted, or adversely affected interstate commerce. The court further explained that extortion under color of official right means the wrongful taking by a public officer of money or property not due to the officer or the office.

The judge also correctly noted that a jury must consider any applicable state law. He adequately paraphrased the Mississippi statute that prohibits any member of the Public Service Commission from accepting any "gift, pass, money or any other benefits whatsoever, either directly or indirectly" from anyone employed or connected with any public utility regulated by the Commission.[3]

---

[3]The Mississippi statute in effect at the time of Snyder's actions provided:

> (1) It shall be unlawful for any member of the public service commission or any employee of said commission to accept any gift, pass, money or any other benefits whatsoever, either directly or indirectly, from any person, firm or corporation operating as a public utility or from any person, firm or corporation employed by any public utility regulated by the commission or connected in any way with such utility regulated by the commission....
>
> It shall be unlawful for any person, firm, or corporation operating as a public utility and subject to regulation by said commission, or any person, firm,

But Snyder contends that the judge then went hopelessly astray in interpreting the state statute. The judge advised the jury "that as a matter of law a public service commissioner is prohibited from accepting campaign contributions from public utilities and common carriers and that, accordingly, such contributions are not money or property

---

> or corporation employed by or connected in any way with a utility regulated by said commission to offer any gift, pass, money or other benefit whatsoever to any member of the commission or any employee thereof or any candidate for election to the commission....
>
> (2) Any member of the public service commission who shall directly or indirectly accept any gift, gratuity, emolument, or employment from any person or corporation owning or operating any railroad, or from any other common carrier, during his continuance in office... shall be subject to criminal prosecution....

Miss. Code Ann. §77-1-11 (1972).

such a public officer is entitled to receive."

Snyder argues that this interpretation of the statute effectively withdrew from the jury the right to decide whether the money received by Snyder consisted of legitimate campaign contributions or illegally extorted funds. Snyder claims this interpretation deprived him of his only defense to extortion and filing false tax returns--that he had not wrongfully taken money but had legally received nontaxable campaign contributions.

We review de novo questions of statutory construction. See Farmers-Merchants Bank & Trust Co. v. CIT Group/Equip. Fin., Inc., 888 F.2d 1524, 1526 n. 3 (5th Cir. 1989). Unfortunately, we have no Mississippi case law and little legislative history to guide us in interpreting this state statute. At the vortex of the dispute is the statutory mandate that members of the Public Service

Commission must not accept "any gift, pass, money or any other benefits whatsoever, either directly or indirectly" from anyone employed by a public utility regulated by the Commission. Miss. Code Ann. §77-1-11 (1972).

Snyder exhorts us to embark upon a complicated historic and linguistic analysis of the statute. He proffers a profusion of polemics involving (1) the history of the statute, (2) comparison of the statute to other Mississippi statutes, (3) custom and practice under the statute, (4) the ejusdem generis doctrine of statutory construction, (5) the need to construe the statute strictly against the state, and (6) first amendment concerns implicated by construing the statute too broadly.

We believe that this assiduous analysis is unnecessary. "The life of the law has not been logic: it has been experience." O.W. Holmes, The Common Law 1 (1881). After

studying the Mississippi Supreme Court's common-sense approach to statutory interpretation, we conclude that the plain meaning of the statute provides a sufficient basis for our decision. See, e.g., Knight v. State, 574 So.2d 662 (Miss. 1990); Frazier v. State, 504 So.2d 675, 724 (Miss. 1987); Peoples Bank & Trust Co. v. L. & T. Developers, Inc., 437 So.2d 7, 11 (Miss. 1983).

In a recent opinion, the Mississippi Supreme Court confronted the issue of whether the game of bingo constitutes a lottery, which is prohibited by the statute in Mississippi. See Knight, 574 So.2d at 662. The court explained that "disposition of this case is not reached by purporting to know what the framers intended nor by utilizing Pythagorean logic." Id. Instead, the court relied on the experience of the judges and on the popular meaning of the terms "bingo" and "lottery" as shown in dictionaries. Id.

The court noted that both games involve the elements of chance, consideration, and prize. But this similarity, the court recognized, does not necessarily mean that bingo is a lottery, for under that approach, the stock market could also be termed a lottery. The court reasoned that the term "lottery" is not a "generic umbrella" that can encompass any enterprise that involves these three elements. Instead, the term "gambling" would be the appropriate generic umbrella. The court therefore concluded that bingo is not a lottery.

In contrast, the statute we consider contains a giant generic umbrella: "any gift, pass, money or any other benefits whatsoever." Miss. Code Ann. §77-1-11 (1972). A gift is "something voluntarily transferred by one person to another without compensation." Webster's Ninth New Collegiate Dictionary 517 (1984). We believe that a campaign contribution fits comfort-

ably within this definition. Thus, even if the money Snyder received consisted of campaign contributions, Mississippi law makes his acceptance of this money illegal because of its source.

The statute contains not only the term "gift," but also the broad expressions "money" and "any other benefits whatsoever." Miss. Code Ann. §77-1-11 (1972). We cannot conceive of campaign contributions that fall outside the enormous scope of these three categories. We conclude, therefore, that the district judge did not err in instructing the jury that Mississippi law prohibited Snyder from accepting the alleged campaign contributions.

Admission of Coconspirator's Statement

Snyder also challenges the admission of the testimony of an attorney who had close connections with all three coconspirators. Specifically, Snyder argues that a conversation between the attorney and one coconspir-

ator, Thurston Little, was inadmissible hearsay. According to the attorney, Little came to his office to consult on a legal matter. Little was upset, the attorney explained, about money that Travis Ward, the third coconspirator, allegedly owed Little.

Snyder objected at trial to the attorney's testimony that during the conversation Little said, "He not only owes me but he--you didn't know this, but after the rate case he promised to pay D.W. Snyder $100,000. Now I don't--I intend to get my money even if I have to sue him." Snyder argues that the district court erred in classifying this statement as nonhearsay under the Federal Rules of Evidence because, although made by a coconspirator, the statement was not made "in furtherance of the conspiracy."[4]

---

[4]Rule 801(d)(2)(E) provides that a statement is not hearsay if "[t]he statement is offered against a party and is... a statement by a coconspirator of a party

The district court's determination that this statement was made in furtherance of a conspiracy is a finding of fact. See United States v. Lujan, 796 F.2d 96, 98 (5th Cir. 1986). We will reverse this decision only if it is clearly erroneous. See id.; United States v. Olivares, 786 F.2d 659, 662 (5th Cir. 1986).

A statement is made in furtherance of the conspiracy if it advances the ultimate objectives of the conspiracy. See United States v. Lechuga, 888 F.2d 1472, 1479 (5th Cir. 1989). Although the phrase "in furtherance of the conspiracy" "has a talismanic ring to it, it must not be applied too strictly or the purpose of the exception would be defeated." United States v. Lindell, 881 F.2d 1313, 1320 (5th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct.

---

during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

2621, 110 L.Ed.2d 642 (1990); see Lechuga, 888 F.2d at 1479-80; United States v. Magee, 821 F.2d 234, 244 (5th Cir. 1987); United States v. Patton, 594 F.2d 444, 447 (5th Cir. 1979). We have consistently shunned an overly literal interpretation of this phrase. See, e.g., United States v. Ascarrunz, 838 F.2d 759, 763 (5th Cir. 1988); United States v. Rodriguez, 689 F.2d 516, 519 (5th Cir. 1982).

After studying the record, we acknowledge that this decision was a close one. We do not believe, however, that the district court's conclusion was clearly erroneous. The attorney testified that Little and other members of the conspiracy exerted subtle pressure on him to assist in the complicated scheme. The record supports the inference that Little's statement about the money Ward owed was intended to facilitate the flow of ill-gotten funds to the members of the conspiracy. See United States v. Diez, 515

F.2d 892, 900 (5th Cir. 1975), cert. denied, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); see also United States v. Metz, 608 F.2d 147, 153 (5th Cir. 1979), cert. denied, 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed.2d 24 (1980)(concluding that a plan to launder ill-gotten proceeds was one facet of a cocaine distribution scheme).

Snyder and the attorney had a conversation about money Ward owed to Snyder. Later, Little told the attorney that Ward owed money to both Little and Snyder. Little also suggested to the attorney that a lawsuit might be necessary to force Ward to pay the money he owed Little. Little and Snyder knew that the attorney had close connections to Ward; in fact, Ward had first introduced Little to the attorney.

The attorney testified that under the surface of Little's remarks were often hidden agendas that Little was seeking to accomplish. It is not clear that Little's

statement to the attorney was merely idle conversation that should have been excluded. See Lechuga, 888 F.2d at 1479-80; United States v. Means, 695 F.2d 811, 818 (5th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1027 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

In light of the evidence, the district judge could have reasonably concluded that Little's comments to the attorney were designed to enlist the attorney's help in collecting from Ward the proceeds of the bribery scheme. Consequently, his conclusion that Little's statement was in furtherance of the conspiracy was not clearly erroneous. A statement made by a coconspirator in furtherance of the conspiracy is not hearsay under the Federal Rules of Evidence. The district judge, therefore, did not err in ruling that it was admissible evidence under Rule 801(d)(2)(E).

Conclusion

Under 18 U.S.C. §666, this Court has jurisdiction over this dispute regardless of whether the alleged offenses had any impact on the federal funds actually received by the Commission. We find no error in the district court's instruction to the jury that Mississippi law prohibited Snyder from receiving campaign contributions from entities regulated by the Commission. We also conclude that the judge's admission into evidence of a statement by a coconspirator was not clearly erroneous. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-1191

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

D.W. SNYDER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion April 25, 19915 Cir. 1991, 903 F.2d 1090)

(June 21, 1991)

Before RUBIN, POLITZ, and DUHE, Circuit Judges.

PER CURIAM:[1]

---

[1]Judge Alvin B. Rubin was a member of the original panel but died on June 11, 1991 before this decision was rendered. This matter is being decided by a quorum. 28 U.S.C. 46(d).

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

Statutes and Rules

Section 371 of Title 18, United States Code, provides:

> **§371. Conspiracy to commit offense or to defraud United States**
>
> If two or more person conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 666 of Title 18, United States Code, provided at the relevant times in petitioner's case:

> **§666. Theft or bribery concerning programs receiving Federal funds**

(a) Whoever, being an agent of an organization, or of a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly, without authority converts to his own use or to the use of another, property having a value of $5,000 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000 or an amount equal to twice that which was obtained in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency,

shall be imprisoned for not more than ten years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(c) Whoever offers, gives, or agrees to give to an agent of an organization or of a State or local government agency, described in subsection (a), anything of value for or because of the recipient's conduct in any transaction or matter or any series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned not more than ten years or fined not more than $100,000 or an amount equal to twice that offered, given or agreed to be given, whichever is greater, or both so imprisoned and fined.

(d) For purposes of this section--

(1) "agent" means a person or organization authorized to act on behalf of another person, organization or a government and, in the case of an organization or a government, includes a servant or employee, a partner, director, officer, manager and representative;

(2) "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, and any other association of persons;

(3) "government agency" means a subdivision of the executive, legislative, judicial, or other branch of a government, including a department, independent establishment, commission, administration, authority, board, and bureau; or a corporation or other legal entity established by, and subject to control by, a government or governments for execution of a governmental or intergovernmental program; and

(4) "local" means of or pertaining to a political subdivision within a State.

Section 666 of Title 18, United States Code, as amended in 1986, P.L. 99-646, §59, and 1990, P.L. 101-647, Title XII, §§1205(d), 1209, now provides:

§666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstances described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be

influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages,

fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State; and

(4)[1] the term "State" includes a State of the United States, the District of Columbia, and any common-

wealth, territory, or possession of the United States.

(4)[1] the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

[1]So in original. See Codification note below.

Editorial Notes

Codification. Sections 1205(d) and 1209 of Pub.L. 101-647 both added pars. (4) to subsec. (d) without reference to each other.

Section 1951 of Title 18, United States Code, **the Hobbs Act**, provides:

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or proper-

ty in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both--

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a

State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Mississippi Code Annotated (1972), **Section 77-1-11**, provided at the relevant times in petitioner's case:

§77-1-11. Gifts, passes, money and other benefits to commission members and employees prohibited.

(1) It shall be unlawful for any member of the public service commission or any employee of said commission to accept any gift, pass, money or any other benefits whatsoever, either directly or indirectly, from any person, firm or corporation operating as a public utility or from any person, firm or corporation employed by any public utility regulated by the commission or connected in any way with such utility regulated by the commission. Any person found guilty of

violating the provisions of this paragraph shall thereby forfeit his or her office or position and shall be fined not less than fifty dollars ($50.00), nor more than one thousand dollars ($1,000.00), or be imprisoned in the county jail for a period not exceeding six (6) months, or both.

It shall be unlawful for any person, firm, or corporation operating as a public utility and subject to regulation by said commission, or any person, firm, or corporation employed by or connected in any way with a utility regulated by said commission to offer any gift, pass, money or other benefit whatsoever to any member of the commission or any employee thereof or any candidate for election to the commission. Any party found guilty of violating the provisions of this paragraph shall be subject to a fine of not exceeding five thousand dollars ($5,000.00).

(2) Any member of the public service commission who shall directly or indirectly accept any gift, gratuity, emolument, or employment from any person or corporation owning or operating any railroad, or from any other common carrier, during his continuance in office, shall forfeit his office, and may be impeached and removed from office for that cause, as well as for any of the causes specified by law for the

impeachment of other state officers. Moreover, said member shall be subject to a criminal prosecution, and, upon conviction, shall be fined not less than one thousand dollars nor more than ten thousand dollars, or imprisoned in the penitentiary not less than one year nor more than ten years, or both.

Mississippi Code Annotated (1972), **Section 77-1-11**, as amended in 1990, now provides:

§77-1-11. Gifts, passes, money and other benefits to commission members and employees prohibited.

(1) It shall be unlawful for any public service commissioner, any candidate for Public Service Commissioner, or any employee of the Public Service Commission or Public Utilities staff to accept any gift, pass, money, campaign contribution or any emolument or other pecuniary benefit whatsoever, either directly or indirectly, from any person interested as owner, agent or representative, or from any person acting in any respect for such owner, agent or representative of any railroad, common or contract carrier by motor vehicle, telephone company, gas or electric utility company, or any other public utility that shall come under the jurisdiction or supervision of the Public Service Commission. Any person

found guilty of violating the provisions of this subsection shall immediately forfeit his or her office or position and shall be fined not less than Five Thousand Dollars ($5,000.00), imprisoned in the State Penitentiary for not less than one (1) year, or both.

(2) It shall be unlawful for any person interested as owner, agent or representative, or any person acting in any respect for such owner, agent or representative of any railroad, common or contract carrier by motor vehicle, telephone company, gas or electric utility, or any other public utility that shall come under the jurisdiction or supervision of the Public Service Commission to offer any gift, pass, money, campaign contribution or any emolument or other pecuniary benefit whatsoever to any public service commissioner, any candidate for Public Service Commissioner or any employee of the Public Service Commission or public utilities staff. Any party found guilty of violating the provisions of this subsection shall be fined not less than Five Thousand Dollars ($5,000.00), or imprisoned in the State Penitentiary for not less than one (1) year, or both.

(3) For purposes of this section the term "emolument" shall include salary, donations, contributions, loans, stock tips,

vacations, trips, honorarium, directorships or consulting posts. Expenses associated with social occasions afforded public servants shall not be deemed a gift, emolument or other pecuniary benefit as defined in Section 25-4-103(k), Mississippi Code of 1972.

Rule 20 of the Mississippi Supreme Court Rules provides:

RULE 20. CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) When Certified. When it shall appear to the Supreme Court of the United State or to any United States Court of Appeals, that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of this Court, the federal court may certify such questions or propositions of law of this state to this Court for rendition of a written opinion concerning such questions or propositions of Mississippi law. This Court may, in its discretion, decline to answer the questions certified to it.

(b) Method of Invoking Rule. The provision of this rule may be invoked by the federal court upon its own motion or the suggestion or motion of any interested party

when approved by the federal court.

(c) Contents of Certificate. The certificate shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

(d) Preparation of Certificate. The certificate shall be certified to this Court by the clerk of the federal court and under its official seal. This Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of the certified question.

(e) Costs. The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by this Court.

(f) Briefs and Argument. The appellant or petitioner in the federal court shall submit the initial brief on the question certified. All briefs, arguments and other proceedings shall be conducted according to these Rules. For the purposes of Rule 28, the date the certified question is filed with this Court

shall be treated as the date beginning the time for briefing.